BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CAROLYN R. CLINE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,065,016
DILLON COMPANIES, INC.	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent appealed the July 16, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark. Mitchell W. Rice of Hutchinson, Kansas, appeared for claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 16, 2013, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

The ALJ found claimant sustained a personal injury by accident arising out of and in the course of her employment with respondent. He also found that pursuant to K.S.A. 2012 Supp. 44-520(b), respondent waived notice because it had actual knowledge of claimant's back injury.

Respondent asserts claimant failed to provide timely notice of her injury as required by K.S.A. 2012 Supp. 44-520(a) and notice was not waived as respondent did not have actual knowledge of claimant's alleged work-related back injury. Although claimant may have told respondent of having back pain, respondent asserts claimant did not inform respondent that the back pain was work related and did not provide the specifics as required by K.S.A. 2012 Supp. 44-520(a)(4). Respondent also argues claimant's injury did not arise out of and in the course of her employment. Claimant asks the Board to affirm the preliminary hearing Order.

The issues before the Board are:

1. Did claimant provide timely notice of her injury as required by K.S.A. 2012 Supp. 44-520(a)? In the alternative, was claimant's requirement to give notice waived, as respondent had actual knowledge of claimant's alleged work-related back injury?

2. Did claimant prove that she sustained a personal injury by accident arising out of and in the course of her employment with respondent?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

In December 2012, claimant worked mainly in respondent's meat department, but was also a cashier. Her primary duties in the meat department were to push carts with meat, unload boxes of meat and put the boxes of meat where they needed to go. The boxes weighed from 15 to 25 pounds. A loaded cart could weigh several hundred pounds. On December 21, 2012, claimant's back was sore and felt the same as it usually did. Claimant testified that as the day went on, her back pain worsened "a little bit, but sometimes it did that."[1] Claimant finished her shift and when she went to bed that night, had a sore back. About midnight, claimant woke up because her back was hurting.

Claimant returned to work the next day, December 22. She grabbed a cart and told Michael Foes, who was in charge, that her back was killing her and that she would try to make it through the shift. According to claimant, Mr. Foes indicated he understood as his shoulder was killing him. Claimant told Mr. Foes she did not know what she did yesterday morning and of waking up during the night and her back hurting. Claimant testified it was her intent to let Mr. Foes know that she hurt her back the previous day.

Claimant testified that she continued to work for respondent, pushing meat carts and lifting boxes of meat, and that her back condition worsened. On February 20, 2013, claimant completed an accident report for respondent. Respondent denied claimant's claim because it was untimely.

Claimant stated she also told co-workers and Donna, the supervisor in scanning, of her back injury. According to claimant, Donna indicated that she already knew claimant was having back issues.

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[1] P.H. Trans. at 7.

Claimant testified she did not request medical treatment from respondent, but sought medical treatment on her own at Hunter Health Clinic. She underwent an MRI at MR Imaging Center on January 4, 2013, that revealed a herniated disc. In April 2013, claimant fell off a ladder at her second job at Dollar General and injured her back and shattered her left heel. Claimant has been unable to work at respondent since the Dollar General accident because of the shattered heel, but has returned to light duty at Dollar General. Claimant indicated she was not treated for her back injury at Dollar General.

On cross-examination, claimant testified that she completed her accident report on February 20, 2013, and that it states her date of injury was December 21, 2012. The accident report also indicated that claimant notified the assistant store manager, Cameron Colvard, of the injury on February 20, 2013. Claimant also acknowledged she never reported to Hunter Health that her back condition was work related. On redirect examination, claimant indicated she did not initially report the accident as work related, because she had "dealt with workmen's comp before and it's not pretty, so if I could get over it, you know, if it was a strain or something like that and I could get over it, that's what I wanted to do."[2]

After claimant testified, her attorney indicated that in light of claimant's testimony, claimant was orally amending her application for hearing "to include a repetitive claim along with our specific date of accident of February 21, 2012,[3] each and every working day up through her last day worked . . . ."[4] Respondent did not object.

Mr. Foes, who was respondent's meat market second assistant manager in December 2012, testified as follows:

> Q. (Mr. Heath) All right. In December of 2012, did Ms. Carolyn Cline provide you with information that suggested to you that she had injured her back as a result of her work activities?
>
> A. (Mr. Foes) She had told me that her back hurt, which wasn't an uncommon thing. I mean every day it was her hip one day, her back one day.
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> Q. Did Ms. Cline complain about various parts of her body from time to time?
>
> A. Yeah, like we all do.
>
> Q. Did she tell you that she had hurt her back at work?

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[2] *Id.* at 26.

[3] Presumably, claimant's attorney meant December 21, 2012.

[4] P.H. Trans. at 28.

A. No.[5]

Mr. Foes testified that on December 22, while claimant was getting ready to push a cart of lunch meat, she indicated her back hurt, "[b]ut at no point did she let me know that it had hurt -- didn't know if she hurt it at Dollar General or if she hurt it here."[6] Mr. Foes indicated he would have sent claimant to complete an incident report if she had said her back injury was work related.

At the request of her counsel, claimant was evaluated by Dr. C. Reiff Brown on May 15, 2013. Dr. Brown's report indicates claimant underwent an EMG[7] on January 4, 2013, that revealed some degenerative desiccation at L3-4 with slight bulging of the annulus, mild bulging of the annulus at L4-5 and a left paracentral herniation at L5-S1 causing left foraminal narrowing. Dr. Brown opined there was a causal connection between claimant's required work conditions and her accident. He also indicated claimant's accident was the prevailing factor causing her injury, her present medical condition and her present need for treatment. Dr. Brown was aware of claimant's April 2013 accident at Dollar General. It was recommended by Dr. Brown that claimant seek a consultation with an orthopedic surgeon for treatment.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[8] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[9]

K.S.A. 2012 Supp. 44-520 provides:

> (a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

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[5] *Id.* at 30.

[6] *Id.* at 31.

[7] Presumably, the doctor meant MRI.

[8] K.S.A. 2012 Supp. 44-501b(c).

[9] K.S.A. 2012 Supp. 44-508(h).

> (A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;
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> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
>
> (C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.
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> Notice may be given orally or in writing.
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> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
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> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
>
> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
>
> (b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
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> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

It is uncontroverted that on December 22, 2012, while getting ready to push a meat cart, claimant told Mr. Foes, who was in charge, her back hurt. Claimant argues she gave timely notice of her work injury as required by K.S.A. 2012 Supp. 44-520(a), when shortly before pushing the meat cart on December 22, she told Mr. Foes her back was killing her. This Board Member finds claimant failed to give timely notice of her injury. By claimant's own admission, she did not tell Mr. Foes the time or particulars of her back injury. She only told Mr. Foes she did not know what she did yesterday morning, that she woke up during

the night and her back was killing her. Claimant never indicated her back pain was work related.

Claimant's application for hearing indicated that she sustained a single traumatic injury on December 21, 2012. At the preliminary hearing, claimant proceeded on that basis. It would be a violation of respondent's right to due process if claimant is allowed to orally amend her application at the preliminary hearing to establish that she gave respondent timely notice. K.S.A. 44-534(a) provides that a party must file with the Director of Workers Compensation an application for a determination of benefits in a form prescribed by the Director. Therefore, this Board Member finds claimant's oral amendment of her application for hearing does not comply with the requirements of K.S.A. 44-534(a).

The ALJ found respondent had actual knowledge of claimant's injury. Presumably, the ALJ made this finding because claimant testified that she was told by the supervisor in scanning, Donna, of already knowing that claimant was having back issues. However, there was no indication that Donna knew claimant's back pain was work related. Moreover, claimant testified that she initially did not want to file a claim because of past experiences with the workers compensation system. Also significant is the fact that claimant sought medical treatment on her own and did not request medical treatment from respondent until several months after December 21, 2012. This Board Member finds respondent did not waive the notice requirements of K.S.A. 2012 Supp. 44-520(a) as respondent did not have actual knowledge that claimant was alleging a work-related back injury.

The issue of whether claimant proved that she sustained a personal injury by accident arising out of and in the course of her employment with respondent is moot.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[11]

WHEREFORE, the undersigned Board Member reverses the July 16, 2013, preliminary hearing Order entered by ALJ Clark.

IT IS SO ORDERED.

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[10] K.S.A. 2012 Supp. 44-534a.

[11] K.S.A. 2012 Supp. 44-555c(k).

Dated this ____ day of October, 2013.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable John D. Clark, Administrative Law Judge